

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MYRON A. MANIER,	)	No. CV-04-0444-CI
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANTS'
	)	MOTION FOR SUMMARY JUDGMENT
v.	)	DISMISSAL AND DENYING AS
	)	MOOT PLAINTIFF'S MOTION FOR
SGT. COOK, SGT. MICHAELSON,	)	INJUNCTIVE RELIEF
DEPUTY SMITH, and DEPUTY PIETZ,	)	
	)	
Defendants.	)	

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BEFORE THE COURT is Defendants' Motion for Summary Judgment dismissal, noted for hearing without oral argument on September 12, 2005. (Ct. Rec. 27.) Also before the court for expedited hearing is Plaintiff's Motion for Injunction. (Ct. Rec. 50.) Plaintiff is proceeding pro se; Spokane County Deputy Prosecuting Attorney Robert B. Binger represents Defendants. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 15.)

A court Order dated March 11, 2005, directed service of Plaintiff's Complaint, which seeks monetary relief for Defendants' alleged use of excessive force, and injunctive relief directing transfer to another facility and enjoining contact with named Defendants. (Ct. Rec. 11, 48.) Plaintiff has since advised the court he was transferred to the Washington Corrections Center on July 14, 2005. (Ct. Rec. 43.) Thus, his prayer for injunctive

1 relief is **DENIED AS MOOT**. Plaintiff also sought injunctive relief,  
2 directing officials at the Washington Corrections Center (WCC) to  
3 provide him access to the law library, pen, paper and carbon. This  
4 court has no jurisdiction over officials at the WCC because they are  
5 not named in the present Complaint. Notwithstanding, in addition to  
6 numerous other pleadings filed since his transfer, Plaintiff filed  
7 a reply brief on September 21, 2005. Therefore, any injunctive  
8 relief involving denial of access to courts as it relates to the  
9 preparation of this case, to the extent this court has jurisdiction  
10 to address it, is **DENIED AS MOOT**.

11 On May 2, 2005, Plaintiff was advised as to summary judgment  
12 requirements pursuant to *Rand v. Rowland*, 154 F.3d 952 (9<sup>th</sup> Cir.  
13 1998), *cert. denied*, 527 U.S. 1035 (1999) (Ct. Rec. 21); Plaintiff  
14 has responded to Defendants' Motion.<sup>1</sup> (Ct. Rec. 53-63.) After a  
15 review of the pleadings and the record, the court **GRANTS** Defendants'

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18 <sup>1</sup>The court has reviewed and considered the following pleadings  
19 filed by Plaintiff: Court Records 54-63, Various Statements in  
20 Opposition to Defendants' Affidavits in Support of Summary Judgment  
21 Dismissal; Ct. Rec. 53, Statement of Facts in Opposition to Summary  
22 Judgment; Ct. Rec. 52, Memorandum in Opposition to Motion for  
23 Summary Judgment; Ct. Rec. 51, Letter from Plaintiff dated September  
24 1, 2005; Ct. Rec. 49, Letter from Plaintiff to Courtroom Deputy; Ct.  
25 Rec. 48, Letter from Plaintiff to Magistrate Judge Imbrogno; Letter  
26 dated September 19, 2005, and received September 22, 2005; Ct. Rec.  
27 73, Plaintiff's Responsive Memorandum filed September 21, 2005.

1 Motion for Summary Judgment Dismissal and **DENIES** Plaintiff's  
2 Emergency Motion.

3 **FACTS**

4 In his First Amended Complaint, Plaintiff alleges that on  
5 October 21, [2004], he refused to "lock up" at the Spokane County  
6 Jail until he spoke with supervisory staff. As a result, he alleges  
7 Officer Smith pointed a yellow Taser gun about three inches from his  
8 face and gave him a directive to turn around and get down on the  
9 ground. As he attempted to follow the directive, Plaintiff further  
10 alleges Officer Pietz unnecessarily clipped him from behind causing  
11 Plaintiff's upper torso and left knee to slam against the ground.  
12 Plaintiff also alleges he was then handcuffed by Officer Pietz in an  
13 "erratic fashion" when there was no need to do so. Plaintiff  
14 further alleges Sgt. Cook and Sgt. Michaelson arrived to investigate  
15 and as Plaintiff began to explain, Officer Smith, in their presence,  
16 used the Taser on Plaintiff's upper left buttock and the middle of  
17 Plaintiff's back. As Plaintiff was assisted back to his cell,  
18 Plaintiff alleges Officer Pietz kicked out Plaintiff's right ankle  
19 causing his right leg to buckle and "forearmed" Plaintiff's head and  
20 face against a desk in the cell, causing injury. Plaintiff then was  
21 confined by straps to a restraining chair.

22 Defendants move for summary judgment dismissal, contending the  
23 use of force was reasonable when Plaintiff refused to obey an order  
24 to return to his cell and consent to a pat down search; they further  
25 contend the force used was in conformity with jail procedures  
26 including its Continuum Ladder of Force.<sup>2</sup> Following the incident,

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28 <sup>2</sup>See Ct. Rec. 34, Hill Aff. at 5, Policy 1.06.01, Continuum

1 Defendants contend Plaintiff was provided medical assistance,  
2 including antibiotic ointment for cuts, a split lip and Taser burns.  
3 He also was scheduled for a dental appointment for treatment of his  
4 chipped tooth, but refused to attend that appointment.

5 Plaintiff admits he became angry and verbally abusive when  
6 Defendant Gossard refused to notarize two documents on October 21,  
7 2004, but asserts he already was subdued prior to use of the Taser.  
8 (Ct. Rec. 55, 58, 59.) Additionally, he contends the Continuum  
9 Ladder of Force was not followed based on his compliance with jail  
10 officials prior to use of the Taser (Ct. Rec. 53) and that it would  
11 have been impossible for him to fight back after being subdued with  
12 the Taser. (Ct. Rec. 53, 55, 56.) He contends Defendant Smith  
13 pointed the Taser at his face, not his chest. (Ct. Rec. 53.) He  
14 also asserts he was treated for a swollen left knee with ice packs  
15 through the next morning (Ct. Rec. 61) and his refusal to attend the  
16 dental appointment was within his right to refuse medical treatment.  
17 (Ct. Rec. 54.) Finally, he contends in various affidavits that  
18 Defendants' recitation of the facts was inconsistent and fabricated.

#### 19 SUMMARY JUDGMENT

20 FED. R. CIV. P. 56(c) states a party is entitled to summary  
21 judgment in its favor, "if the pleadings, depositions, answers to  
22 interrogatories, and admissions on file, together with the  
23 affidavits, if any, show that there is no genuine issue as to any  
24 material fact and that the moving party is entitled to judgment as  
25 a matter of law." See also *Celotex Corp. v. Catrett*, 477 U.S. 317  
26 (1986). Once the moving party has carried the burden under Rule 56,

27 \_\_\_\_\_  
28 Ladder of Force.

1 the party opposing the motion must do more than simply show there is  
2 "some metaphysical doubt" as to the material facts. *Matsushita*  
3 *Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).  
4 The party opposing the motion must present facts in evidentiary form  
5 and cannot merely rest on the pleadings. *Anderson v. Liberty Lobby,*  
6 *Inc.*, 477 U.S. 242, 248 (1986). Affidavits, depositions, answers to  
7 interrogatories and admissions are sufficient to raise a material  
8 question of fact. *Celotex*, 477 U.S. at 324. Genuine issues are not  
9 raised by mere conclusory or speculative allegations. *Lujan v.*  
10 *National Wildlife Federation*, 497 U.S. 871 (1990). The court will  
11 examine the direct and circumstantial proof offered by the nonmoving  
12 party and the permissible inferences which may be drawn from such  
13 evidence. A party cannot defeat a summary judgment motion by  
14 drawing strength from the weakness of the other party's argument or  
15 by showing "that it will discredit the moving party's evidence at  
16 trial and proceed in the hope that something can be developed at  
17 trial in the way of evidence to support its claim." *T.W. Electric*  
18 *Service Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630  
19 (9th Cir. 1987); *see also, Triton Energy Corp v. Square D. Company,*  
20 68 F.3d 1216 (9th Cir. 1995).

21 **42 U.S.C. § 1983**

22 To demonstrate a claim under 42 U.S.C. § 1983, Plaintiff must  
23 allege and prove (1) the violation of a right secured by the  
24 Constitution and laws of the United States, and (2) the deprivation  
25 was committed by a person acting under color of state law. *Parratt*  
26 *v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other*  
27 *grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Leer v.*  
28 *Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988). A person subjects

1 another to a deprivation of a constitutional right when committing  
2 an affirmative act, participating in another's affirmative act, or  
3 omitting to perform an act which is legally required. *Johnson v.*  
4 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). To hold a defendant  
5 liable for damages, the wrongdoer must personally cause the  
6 violation. *Leer*, 844 F.2d at 633. There is no respondeat superior  
7 liability. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).  
8 Thus, a supervisor is liable under § 1983 only if he/she  
9 "participated in or directed the violation, or knew of the violation  
10 and failed to prevent it." *Id.* If damages are sought, sweeping  
11 conclusory allegations against a prison official will not suffice;  
12 an inmate must set forth specific facts as to each individual  
13 defendant's participation. *Leer*, 844 F.2d at 634.

#### 14 EIGHTH AMENDMENT

15 The affidavit produced by Sgt. Anderton (not a defendant in  
16 this action), discloses he was called to 6 East at the Spokane  
17 County Jail on October 21, 2004, to assist when an inmate  
18 (Plaintiff) refused to lock down. When he arrived at the dayroom,  
19 he observed several officers ordering Plaintiff to get down on the  
20 floor. As he began to kneel down, Sgt. Anderton saw Plaintiff come  
21 back up again. Sgt. Anderton used his hands to push him forward and  
22 down to the floor in conformance with the Continuum Ladder of Force  
23 Step 3, Level 1. Plaintiff started to kick and move around so Sgt.  
24 Anderton was able to pin his waist to the ground by pressing his  
25 right knee into Plaintiff's buttocks. Plaintiff continued to thrash  
26 his upper body, so Defendant Smith (who was trained and is qualified  
27 to use the Taser, Ct. Rec. 34-1, Hill Aff.) used the Taser in a  
28 "drive-stun technique." (Continuum Ladder of Force Step 4, Level

1 1.) Sgt. Anderton was able to gain control of Plaintiff's legs and  
2 handcuffed him. Two Taser shots were fired as evidenced by the data  
3 download, one at 15:47:32 and again at 15:47:39,<sup>3</sup> seven seconds  
4 apart.<sup>4</sup> Plaintiff was then sufficiently subdued to be escorted to  
5 his cell, where Officer Pietz began to pat search him as Plaintiff  
6 stood in the back of the cell next to the desk. Sgt. Anderton  
7 states Plaintiff began to yell, then lunged forward, striking his  
8 head on the wall in front. He kicked backward and struck Officer  
9 Pietz, knocking him backward. Sgt. Anderton used an elbow strike<sup>5</sup>

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11 <sup>3</sup>Each time the Taser is fired, the time of firing is recorded  
12 in its electronic memory, information that is retrievable for later  
13 review. (Ct. Rec. 34, Hill Aff. at 4.)

14 <sup>4</sup>Each time the Taser is fired, the electric current lasts for  
15 five seconds, causing incapacitation ("dazed") for several seconds  
16 or minutes. (Ct. Rec. 34, Hill Aff. at 3, 19.) It also is possible  
17 for the trigger of the Taser to be held down continuously, emitting  
18 electric current until the trigger is released. (Ct. Rec. 34, Hill  
19 Aff. at 20.) Based on the download data, that was not done here.  
20 Additionally, it is recommended the Taser be fired at the victim's  
21 back; exposure to the face, throat or groin should be avoided. (Ct.  
22 Rec. 34, Hill Aff. at 23.) Although Plaintiff alleged his face was  
23 exposed to the Taser, based on the medical findings, residual marks  
24 indicated the shots were to the back area. (Ct. Rec. 51, Victim  
25 Witness, att. clinical notes by Dr. Kennedy.)  
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28 <sup>5</sup>An elbow strike is an appropriate use of force when an inmate

1 with his right arm to force Plaintiff's head and shoulders down to  
2 the desk level and pinned him there. (Continuum Ladder of Force  
3 Step 4, Level 2.) Officer Smith placed the Taser on Plaintiff's  
4 right shoulder, but did not activate it. (Ct. Rec. 39. Smith Aff.)  
5 Officer Pietz regained control of Plaintiff's right side, and  
6 together with Sgt. Anderton, was able to seat Plaintiff on the  
7 floor. Pursuant to Policy 3.04.02.A (restraint of inmate who has  
8 attempted self harm<sup>6</sup>), Plaintiff was then carried downstairs and  
9 placed in a restraint chair, with a spit net over his head. Nurse  
10 St. Pierre arrived to check the straps; Plaintiff shook and rocked  
11 the chair while she was there. (Ct. Rec. 30, Aff. Sgt. Anderton;  
12 Ct. Rec. 38, Pietz Aff.; Ct. Rec. 40, St. Pierre Aff.)

13 Dr. Kennedy examined Plaintiff on October 22. He noted split  
14 lip, broken tooth, cut to the right eye, with Taser marks in the  
15 middle of his back and minor abrasions on his right front shoulder.  
16 (Ct. Rec. 51, Victim Statement, att.) Plaintiff's left knee was  
17 slightly swollen. No additional medical treatment was necessary  
18 other than continuing Plaintiff's use of Naprosyn.

19 The use of excessive force by a prison official violates a  
20 prisoner's Eighth Amendment right to be free from cruel and unusual  
21 punishment. An Eighth Amendment violation occurs only when a prison  
22 official applied force "maliciously and sadistically to cause harm."

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25 presents a threat of substantial bodily harm to self or others.  
26 (Ct. Rec. 34, Hill Aff.)

27 <sup>6</sup>Plaintiff admits he has made "past and present" suicide  
28 attempts. (Ct. Rec. 55, at 4.)



1 *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). To determine whether the  
2 use of force was wanton and unnecessary, relevant factors include:  
3 "the extent of injury suffered [,] . . . the need for application of  
4 force, the relationship between that need and the amount of force  
5 used, the threat [to the safety of staff and inmates] 'reasonably  
6 perceived by the responsible officials,' and 'any efforts to temper  
7 the severity of a forceful response.'" *Id.* (quoting *Whitley v.*  
8 *Albers*, 475 U.S. 312, 322 (1986)).

9       There is no Eighth Amendment violation if "force was applied in  
10 a good-faith effort to maintain or restore discipline." *Id.* Prison  
11 administrators should be accorded wide-ranging deference in the  
12 adoption and execution of policies and practices that in their  
13 judgment are needed to preserve internal order and discipline and to  
14 maintain institutional security. *Whitley*, 475 U.S. at 322-23. The  
15 infliction of pain in the course of implementing prison security  
16 measures does not amount to cruel and unusual punishment even though  
17 it may appear, in hindsight, the degree of force was unreasonable.  
18 *Whitley*, 475 U.S. at 319. An allegation of cruel and unusual  
19 punishment should proceed to trial only if the evidence supports a  
20 reliable inference the prison official intended to inflict pain.  
21 *Whitley*, 475 U.S. at 322.

22       It is undisputed the incident in question began when Plaintiff  
23 became angry because Defendant Gossard would not notarize legal  
24 documents because the papers involved actions against county  
25 employees. (Ct. Rec. 51, Victim Statement; Ct. Rec. 33, Gossard  
26 Aff.). It also is undisputed Plaintiff refused to return to his  
27 cell when ordered to do so and was verbally abusive. (Ct. Rec. 51,  
28 Victim Statement; Ct. Rec. 33, Gossard Aff.)

1 The Ninth Circuit has held the use of a Taser is not per se  
2 unconstitutional. *Michenfelder v. Sumner*, 860 F.2d 328, 336 (9<sup>th</sup>  
3 Cir. 1988). However, its use is not without restriction. "[T]he  
4 appropriateness of the use must be determined by the facts and  
5 circumstances of the case." *Soto v. Dickey*, 744 F.2d 1260, 1270 (7<sup>th</sup>  
6 Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985). A legitimate prison  
7 policy of carrying Tasers to enforce discipline and security would  
8 not warrant their use when unnecessary or "for the sole purpose of  
9 punishment or the infliction of pain." *Id.* at 1270.

10 If the evidence, viewed in a light most favorable to Plaintiff,  
11 would support a finding of excessive force, Defendants would not be  
12 entitled to summary judgment dismissal. However, here the  
13 undisputed evidence does not raise a material question of fact under  
14 the Eighth Amendment standard. Specifically, Plaintiff's decision  
15 not to return to his cell as ordered, his admitted verbal abuse,  
16 Defendants' use of two Taser shots rather than a continuous trigger,  
17 the decision not to Taser Plaintiff a third time, the minor injury  
18 suffered, and Plaintiff's admitted history of self harm, would  
19 compel a finding by a jury that Defendants' use of force was within  
20 the scope of policy for the purpose of maintaining and restoring  
21 order at the jail, protecting the officers involved, and preventing  
22 Plaintiff from self harm. There is no evidence to create a material  
23 question of fact Defendants' subjective intent was to inflict  
24 serious pain. *Whitley*, 475 U.S. at 322. Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for injunctive relief (**Ct. Rec. 50**) is  
27 **DENIED AS MOOT.**

28 2. Defendants' Motion for Summary Judgment dismissal (**Ct.**

1 **Rec. 27)** is **GRANTED**. Plaintiff's Complaint and claims are **DISMISSED**  
2 **WITH PREJUDICE**.

3 3. The District Court Executive is directed to file this  
4 Order and provide a copy to Plaintiff and counsel for Defendants.  
5 Judgment shall be entered for Defendants and the file shall be  
6 **CLOSED**.

7 DATED October 4, 2005.

8  
9 S/ CYNTHIA IMBROGNO  
10 UNITED STATES MAGISTRATE JUDGE  
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